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The United States Army Reservist: Hair Today, Gone Tomorrow

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COMMENTS

THE UNITED STATES ARMY RESERVIST[1]: HAIR TODAY, GONE TOMORROW

She asked me why, I'm just a hairy guy . . .
Don't ask me why, don't know
It's not for lack of bread . . .
Long beautiful hair . . .
Give me down to there, hair, shoulder length or longer
My hair like Jesus wore it, hallelujah I
Adore it, hallelujah Mary loved her son
Why don't my mother love me?

Hair, Gerome Ragni,
James Rado, Galt Macdermot (1968)

Alexander the Great ordered his troops to cut off their beards as a military precaution. Peter the Great proscribed beards for his stubborn subjects in an effort to Westernize them.[2] Raderman and Gianatasio were commanded to cut their hair in order to "satisfactorily participate" in their respective Army Reserve and National Guard unit drills. Failure to obey the mandates of Alexander and Peter, however, merely imposed a tax upon the bearded while long-haired Raderman and Gianatasio faced orders to active duty in the regular Army.

It has been suggested that "the first aim of military justice is not justice but discipline—discipline by any means. . . ."[3] As methods of discipline, the above hair restrictions have been sanctioned.

I. Present Plight of the Reservist: *Raderman* and *Gianatasio*

In 1969, *Raderman v. Kaine*[4] was brought to establish substantive rights for the Reservist. Harold Raderman had been "redlined"[5] from more than five reserve meetings for failure to measure up to Army stand-

1. In general, the National Guardsman [hereinafter referred to as Guardsman] is subject to the same statutory and judicial restrictions as the United States Army Reservist [hereinafter referred to as Reservist]. There are, however, two notable distinctions between the Guardsman and the Reservist that may bear upon points presented in this comment: first, military jurisdiction over the Guardsman is conferred by state statute; second, the protection of the Bill of Rights is applicable to the Guardsman through the fourteenth amendment.

2. P. Binder, Muff and Morals 87, 91 (1965).

3. R. Sherrill, Military Justice is to Justice as Military Music is to Music jacket (1969).

4. 411 F.2d 1102 (2d Cir.), *petition for cert. dismissed,* 396 U.S. 976 (1969).

5. A term used within the reserve units of the armed forces when a Reservist's attendance at a meeting is not accepted.

ards and was, therefore, facing imminent reactivation into the regular Army. His hair was too long. The plaintiff joined the United States' Army Reserve in 1963, served six months active duty and then returned to his reserve unit to attend meetings for the balance of his obligation. Upon return, he obtained employment in a theatrical agency as agent for "rock and roll" bands. This position required him to wear his hair longer than conventional Army length.[6] The plaintiff was warned by his reserve unit that if he did not get his hair cut he would be redlined. Raderman explained his employment position to the reserve unit and wrote letters to his Congressman and to the Vice President, to no avail. A suit was then brought challenging as unconstitutional, the application to him of certain statutes, Army Regulations, and an Army Directive. It alleged, in particular, denial of property or liberty to practice his chosen profession without due process of law. The defendant, Major General Kaine, moved for an order dismissing the complaint or alternatively for summary judgment in his favor. The district court granted the motion for summary judgment and the circuit court of appeals affirmed. *Held,* such an affirmative suit before induction order, rather than by habeas corpus application after order, does not establish the judiciary as arbiter of what constitutes a neat and soldierly appearance for a reservist within the meaning of Army Regulation; appearance is within the discretion of the military and the Army's determination that haircuts be well-groomed, cut short or medium length, and trimmed at all times, subject to no exceptions, was a rational exercise of that discretion. The court therefore concluded that refusal to grant an exception to an Army reservist whose job necessitated breach of those Army regulations was not an abuse of discretion. The Supreme Court of the United States dismissed a petition for certiorari.

In 1970 *Gianatasio v. Whyte*[7] was brought to establish procedural rights for the Guardsman. Frank Gianatasio Jr. had been similarly redlined from more than five National Guard meetings for failure to measure up to Army standards and was, therefore, facing imminent reactivation into the regular Army. Gianatasio's hair also was too long. The plaintiff had enlisted in the Connecticut Army National Guard in 1965, served his required active duty period and then returned to his guard unit to attend meetings for the balance of his obligation. While physically present and ready to participate in these meetings he was informed by his commanding officer that his non-conforming hairdo did not present the "neat appearance" required by National Guard regulations. Gianatasio insisted that his hair style was required for his civilian employment as a salesman of

6. Plaintiff's employer confirmed this in a letter stating that the plaintiff's value to the firm "would be sharply curtailed" if his hair was short.

7. 426 F.2d 908 (2d Cir.), *cert. denied,* 400 U.S. 941 (1970); *accord,* Scaggs v. Larsen, 423 F.2d 1224 (9th Cir.), *cert. denied,* 400 U.S. 930 (1970).

fashionable apparel, and had a letter from his employer confirming this. He further contended that his hair was "neat" by all but Army standards. An action was then brought for a declaratory judgment that the application to Gianatasio of certain statutes, National Guard regulations, and procedures pursuant to them was unconstitutional, as both imposing a punishment and denying him the right to practice his chosen profession without due process of law; in addition, an injunction reinstating him in the National Guard and preventing his activation was sought. The defendant, Lieutenant Whyte, moved for summary judgment. The district court granted the motion and the circuit court of appeals affirmed. *Held,* the statute authorizing the direct ordering of a Guardsman to active duty rather than in accordance with the procedures set forth in his enlistment contract is constitutional. While this government imposition of direct ordering to active duty may be punishment without the protection of constitutionally required procedural rights, the plaintiff has not intimated actual injury by lack of any of those procedures. On the issue of "neat appearance" rules unjustly depriving the plaintiff of his right to a civilian livelihood, *Raderman* remains controlling. The Supreme Court of the United States denied certiorari.

Thus, it appears that the Reservist has no enforceable rights in the area of personal appearance; note that both *Raderman* and *Gianatasio* were summary judgments for the defendant military officers. Contrasted with this bleak prospective, however, is the conviction that the court did not intend such an absolute denial of rights. For an astute analysis of the Reservist's plight in this area, an understanding of the statutory and judicial framework within which the Reserves operate is necessary.[8]

II. STATUTORY FRAMEWORK

Congress' power to enact a code of laws for the Army is specifically set forth in the Constitution.[9] Under these laws, the President is authorized to order to active duty any member of the Ready Reserve[10] who is not

8. This is not to imply that an understanding of the executive, as Commander in Chief of the Army, would not be beneficial. Such an endeavor, however, is beyond the scope of this comment. *See, e.g.,* Exec. Order No. 11,366, 32 C.F.R. 11411 (1967).

9. See U.S. CONST. art. I § 8, cl. 14, empowering Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."

10. The Ready Reserve contract requires one active duty period of not less than 120 days for basic and MOS training, supplemented by 48 local reserve unit drills and a 2 week active duty training period per year for the remainder of the six year obligation. The 48 drills are usually held either 1 night a week or 1 weekend a month, depending on the unit. The reservist is allowed unexcused absences at not more than 10% of his meetings, without disciplinary action. Format A, 6-year enlistment in a unit of the United States Army Reserve (17-25 incl.).

"participating satisfactorily."[11] "To achieve fair treatment among members of the Ready Reserve," however, consideration is given to "family responsibilities; and employment necessary to maintain national health, safety or interest."[12] Members of reserve units are also exempt from induction into the regular Army only "so long as they continue to be such members and satisfactorily participate in scheduled drills and training periods as prescribed by the Secretary of Defense . . . ."[13] Army Regulations prescribed by the Secretary of Defense vis-à-vis the Department of the Army define "satisfactory participation" as "attendance at all scheduled unit training assemblies . . . unless excused by proper authority;" a member is not satisfactorily participating "unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander."[14] Army Regulations enacted in 1967 define "military discipline," as "a state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. It is found upon respect for and loyalty to properly constituted authority."[15] Changes made in 1969 to the above regulation on "military discipline" set specific standards defining a "neat and soldierly appearance" for hair and went on to include sideburns in a section on "appearance," as follows:

> (1) It is the responsibility of commanders to see that military personnel present a neat and soldierly appearance. Commanders will establish policies and standards in the area of personal appearance to insure that the members of their command appear neat and soldierly. Degrading or depersonalizing actions, such as the practice of requiring heads of soldiers to be shaved, are forbidden. However, a soldier may voluntarily have his head shaved.
>
> (2) The hair, including sideburns, will be well-groomed, cut short or medium length and neatly trimmed at all times. The face will be clean shaven, with the exception that wearing a neatly trimmed mustache is permitted.[16]

Below the level of Army Regulations, are the Army Directives promulgated by the unit commanders. For example, until July 1, 1968 an Army Directive gave individuals "the right to retain long hair" if it contributed "to the individual's civilian livelihood."[17] At that time it was superseded

11. 10 U.S.C. § 673 (a) (Supp. IV, 1969), Military Selective Service Act of 1967.
12. *Id.*
13. 50 U.S.C. App. § 456 (c) (Supp. IV, 1969), Military Selective Service Act of 1967.
14. Army Reg. 135-91 (5) (d) (2) (June 11, 1968).
15. Army Reg. 600-20 (Jan. 31, 1967).
16. Army Reg. 600-20 with C5 and C6 (Dec. 18, 1969).
17. Weekly Bulletin 42, October 20, 1967. *See also* Smith v. Resor, 406 F.2d 141 (2d Cir. 1969).

by another directive which prohibited reservists, without exception, from wearing their hair longer than the standard set forth in the above regulation. Below the level of Army Directives are the discretionary policies of the local commanding officer "in the area of personal appearance." These policies may impose additional standards upon the Reservist or, by selective enforcement, ease existing standards. While the mandate for personal appearance standards begins at the upper end of the chain of command, the codification of standards often begins, for expediency, on the lower level of the unit commanders.

This complex interrelationship of the military's statutes, regulations, directives and local policies places the Reservist within an institutional maze. At the very least, therefore, judicial review seems necessary to protect the Reservist from an abuse of "military discipline."

III. Judicial Development

Traditionally, military matters, including purely discretionary decisions of military officers, have been held judicially non-reviewable.[18] In *Harmon v. Brucker*[19] the Supreme Court limited its non-review of military actions to cases where the military personnel acted within their statutory authority.[20] However, the Reservist does not obtain a vested right in a statute or regulation when he joins the armed forces and such statutes and regulations can be changed subsequently without permitting judicial review.[21] Notwithstanding this abstention policy toward military affairs, in 1961 the judiciary ruled that a military litigant need not exhaust his administrative remedies to obtain judicial review.[22] In 1965, the judiciary held that it would review military regulations to see that procedural due process was accorded the plaintiff.[23] Finally, in *Winters v. United States*,[24] Mr. Justice Douglas, as Circuit Justice, held that it would stay a ready reservist's reactivation pending a determination on the merits in the court of appeals. The Court reasoned that one of its most important functions historically, has been to protect people who had been placed beyond its reach by military discipline or punishment. Therefore, the Court has apparently estab-

18. Orloff v. Willoughby, 345 U.S. 83 (1953); McCurdy v. Zuckert, 359 F.2d 491 (5th Cir. 1966).

19. 355 U.S. 579 (1958) (per curiam).

20. *See, e.g.*, Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969).

21. Heuchman v. Laird, 427 F.2d 980 (8th Cir. 1970); Schwartz v. Franklin, 412 F.2d 736 (9th Cir. 1969); Fox v. Brown, 402 F.2d 837 (2d Cir. 1968).

22. Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961).

23. Dunbar v. Ailes, 230 F. Supp. 87 (D.D.C. 1964), *aff'd*, 348 F.2d 51 (D.C. Cir. 1965).

24. 89 S.Ct. 57 (Douglas, Circuit Justice, 1968).

lished jurisdiction to review military matters both procedurally and substantively.

Since the Court's departure from its policy of abstaining in military affairs has been recent, there is little common law concerning military regulations. There are, however, analogous physical appearance regulations in the area of school law. Cases challenging these school regulations are presently being decided. Also analogous has been the apparent abstention policy the courts have developed towards review of school regulations. In *Board of Education v. Barnette*,[25] the Supreme Court recognized that boards of education have "important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[26] The Court reasoned, however, that "[w]e cannot because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the functions of this Court when liberty is infringed."[27] The Court concluded that the flag salute was a form of communication and enjoined enforcement of the Board of Education regulation requiring a flag salute, where it infringed upon a person's first amendment right to religious freedom.

Since 1966, numerous actions have been brought challenging board of education regulations forbidding male students to wear long hair. Seven recent circuit courts of appeals decisions have imparted a division among four of the circuits.[28] In *Ferrell v. Independent School District*,[29] the Fifth Circuit Court of Appeals held the hair regulation valid, reasoning that the Constitution does not establish an absolute right to free expression of ideas, but one which may be infringed by the state if there are compelling reasons to do so; a regulation considered by the principal to be necessary in order to provide the best possible education was such a compelling reason.[30] In *Breen v. Kahl*,[31] the Seventh Circuit Court of Appeals held

25. 319 U.S. 624 (1943).

26. *Id.* at 637.

27. *Id.* at 640.

28. Since this comment's primary concern is Reserve Regulations, only the circuit courts of appeals' decisions in the area of school law will be presented for analogy; these decisions encompass the varying opinions of all the school cases.

29. 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 85 (1968). Plaintiffs were male students refused enrollment in high school for failure to comply with a school regulation banning long hair. The students wore their hair long because they were members of a "rock and roll" musical group. *Accord,* Stevenson v. Board of Education, 426 F.2d 1154 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970); Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Davis v. Firment 408 F.2d 1085 (5th Cir. 1969). *Cf.* Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970) upholding prisoner haircut and shaving regulations.

30. The court also concluded that school, at this stage of the plaintiff's life, might be his most important activity. Ferrel v. School District, 392 F.2d 697, 704 (5th Cir.), *cert. denied,* 393 U.S. 85 (1968).

31. 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970). Plaintiffs were male students expelled from high school for challenging the following regulation by

the hair regulation invalid reasoning that freedom to wear one's hair at a certain length or in any desired manner is protected by the Constitution as a form of expression, even though it expresses nothing but individual taste; the state failed to meet its burden of justifying the regulation which invaded that freedom. Judge Kerner further reasoned that the manner in which many young people wear their hair is an expression of individuality, of the freedom of a person to present himself physically to the world in the manner of his choice, and possibly, even expression of a cultural revolt.[32] Judge Kerner concluded that it was a highly-protected freedom and that the state may not suppress such conduct simply because it may express a disapproved attitude.[33] In *Jackson v. Dorrier*,[34] the Sixth Circuit Court of Appeals held the hair regulation valid, reasoning that the objecting students' hair lengths were not intended as expression within the concept of free speech and, that there was substantial evidence to show a reasonable connection between the regulation and the successful operation of an educational system by maintaining school discipline; therefore, the regulation did not violate the constitutional rights of the students. And in *Richards v. Thurston*,[35] the First Circuit Court of Appeals held the hair regulation invalid reasoning that the due process clause establishes a sphere of personal liberty which includes the right to wear one's hair as he wishes subject to state infringement only for legitimate public purposes; no justification had been offered for the regulation. The court further reasoned that there was "no inherent reason why decency, decorum or good conduct require[d] a boy to wear his hair short" and concluded that "compelled conformity to conventional standards of appearance [was not] a justifiable part of the educational process."[36] In addition, in *Tinker v. Independent School District*,[37] the Supreme Court held that the wearing of armbands in school for the purpose of expressing one's views was a form of communication protected by the free speech clause of the first amendment. Mr. Justice Fortas reasoned that "in our system, undifferentiated fear or

wearing long hair: "Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side, and must be above the eyebrows. Boys must be clean shaven; long sideburns are out."

32. 419 F.2d at 1036.

33. *Id. Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965) holding that the right of a husband and wife to use contraceptives, a right of marital privacy, is highly protected.

34. 424 F.2d 213 (6th Cir. 1970). Plaintiffs were male students who refused to comply with a public school regulation that required them to cut their long hair as a prerequisite to attending high school. The students permitted their hair to grow because they were members of a musical combo.

35. 424 F.2d 1281 (1st Cir. 1970). Plaintiffs were male students who were suspended from high school for wearing their hair longer than school regulations allowed.

36. *Id.* at 1286.

37. 393 U.S. 503 (1969). It should be noted that the Court distinguishes this case from cases involving dress or clothing regulation in schools.

apprehension of disturbance is not enough to overcome the right to freedom of expression . . . our Constitution says we must take the risk."[38] Thus, the free speech clause of the first amendment and the due process clause of the fifth and fourteenth amendments have been construed as creating physical appearance rights for individuals under the discretion of governmental agencies; note that no school case was decided by summary judgment for the defendant school board. In view of the statutory and judicial background, one must question the propriety of denying the Reservist the right to wear his hair in any desired manner.

IV. Constitutionality of the Reserves' Hair Restrictions

A. *Judicial Review for the Reservist*

After being "redlined" from five meetings, the Reservist has not only been precluded from fulfilling his contractual obligation but also faces the punishment of imminent call-up for active duty, an establishment of actual and potential injury. Often the Reservist's functioning in his civilian employment has also been seriously impaired.[39] He has suffered these injuries as a result of trying to express himself through the manner in which he wears his hair. The nature and location of the injury, the status of the plaintiff at the time of injury, and the nature of the right abridged determine whether the military or civil judiciary shall have jurisdiction.[40] The Reservist, when he is not on active duty,[41] is only a part-time soldier; for more than 28 days a month he is a civilian. As a civilian he is subject to civilian laws and entitled to protection in civilian courts. The Reservist's injuries all relate to this civilian status he maintains. If the Reservist cuts his hair, his civilian job may suffer; if he does not cut his hair, he is subject to complete removal from civilian status. In addition, the reserve contract, which the Reservist is forced to breach by being redlined, has a civilian nature. It was signed when the Reservist was a full-time civilian and sets the time limits during which his civilian status may be superseded by the military. If the military seeks to extend this time limit by unilateral action, surely a question of civilian rights has been raised. These dual status problems are generated because a part-time standard concerning hair cannot be applied to a part-time soldier. The result is a full time hair standard. Unlike his uniform which can be taken off when he returns from his drill, if the Reservist cuts his hair according to military standards, it necessarily re-

38. *Id.* at 508.

39. *See, e.g., supra* note 6.

40. *See generally* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); *Ex parte* Milligan, 71 U.S. 2 (1866).

41. For what constitutes active duty see *supra* note 10.

mains that way when he returns from his drill, thereby affecting his civilian rights. Therefore, even if the Reservist's employment would not suffer when he cut his hair for Reserve drills, his civilian right to freedom of expression and liberty via the manner in which he chose to wear his hair, would be seriously infringed. To view the situation in *Raderman* and *Gianatasio* as strictly a military matter is to deny the reality of the Reservist's status. As a result, the civil judiciary must be the arbiter of whether there is sufficient justification for infringement of the Reservist's rights.[42] However, even if *Raderman* and *Gianatasio* are improperly viewed as a military matter, the Supreme Court has departed from its abstention policy toward military affairs. And, as in *Winters,* the civil judiciary must make a determination on the merits of the rights of the Reservist.

B. *Historical and Institutional Analysis of Man and His Hair*

"Nothing man wears is an accident. He dresses in sympathy with his age."[43] As far back as primitive man, hair has been styled and worn as a sign of feats and qualities or as a symbol of mourning or joy.[44] The ancients regarded the beard as a sacred token of virility, and looked upon hair as the source of strength.[45] Short hair was often a sign of servitude, as among the Greeks, Celts, and Germans.[46] In the 11th century the Church forbade men to wear long hair.[47] By the 12th century bishops carried scissors to effectuate the Church's protest against the vanity of men growing long hair.[48] Something in the psychology of war, however, favored the growth of hair on men; the Crusades fostered the Saracenic mustache, the Napoleonic wars encouraged sideburns, the Crimean war brought forth the shaggy beard and Prussian militants turned up the ends of their mustaches "fiercely like two bayonet-points."[49] Therefore, until World War I, except for a brief interlude during the French Revolution, men wore lengthy hair in opposition to those prior restrictions and symbolizations.[50] World War I gave rise, for reasons of sanitation, to short hair for military men and that style became the vogue until the mid-1960's, when men returned to a lengthy hair style.

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42. *Cf.* Gerwig, *Court-Martial Jurisdiction Over Weekend Reservists?,* 44 MIL. L. REV. 123 (1969) contending that the Uniform Code of Military Justice does not extend to Reservists on weekend drills.

43. P. BINDER, MUFF AND MORALS 96 (1965).

44. THE COLUMBIA ENCYCLOPEDIA 842 (2d ed. 1959).

45. "Beards were held in such esteem in Babylon that no oath was considered legal and binding unless sworn on one." P. BINDER, MUFF AND MORALS 85, 100 (1965).

46. THE COLUMBIA ENCYCLOPEDIA 842 (2d ed. 1959).

47. *Id.*

48. P. BINDER, MUFF AND MORALS 102 (1965).

49. *Id.* at 95-96.

50. *See* THE COLUMBIA ENCYCLOPEDIA 842 (2d ed. 1959).

Concurrent with the return to a lengthy hair style, however, has been the growth of institutional opposition to such expression.[51] Even a cursory examination of any of the media of today clearly shows that those opposed to long hair on men do consider it a form of expression.[52] A study of the thousands of students who, each year, are threatened with suspension from school for wearing long haircuts makes it equally clear that those in favor of long hair on men consider it a form of expression.[53] A study of those Reservists "redlined" each year for wearing their hair too long would reinforce this conclusion. The term "expression" is deprived of much of its meaning when personal appearance is excluded from its scope because personal taste in grooming is self-expression.[54] Therefore, the issue becomes whether the Bill of Rights protects the self-expression, through hair style, of a Reservist.

C. *Applicability of the Bill of Rights*

"[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[55] Accordingly, our Reservists, with their dual status, must be protected. A problem arises, however, upon trying to squarely fit a right of personal appearance into the sphere of rights protected by the first ten amendments; something does not fit squarely into a sphere.

> But the ideas of 'life, liberty and the pursuit of happiness' expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncracies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men.[56]

While the school law cases exemplify the problem, they do suggest two sound bases for protecting the Reservists' right to expression through hairstyle.

In *Richards,* the right to wear one's hair as one desires was considered protected by the due process clause, as within the concept of liberty.

51. *See generally* E. GOFFMAN, ASYLUMS (1961), concerning institutional discipline.

52. *See, e.g.,* LIFE, Mar. 20, 1970, at 34. A roadsign on many of our highways suggests "Help Clean Up America, Get a Haircut." This same feeling is echoed in the "Letters to the Editor" columns of our local newspapers and on many of the radio and television talk shows. To arouse such a response, the wearing of long hair by men must be a form of communication.

53. Comment, *A Student's Right to Govern His Personal Appearance,* 17 J. PUB. L. 151, 171 (1968), *citing* 3 EDUCATION AGE 23 (1966).

54. Comment, *supra* note 53, at 161.

55. Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181, 188, (1962).

56. Ferrell v. Independent School District, *cert. denied,* 393 U.S. 856 (1968) (Douglas, J., dissenting).

"'[L]iberty' seems to us as incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty."[57] This concept recognizes the existence of substantive rights, beyond those specifically enumerated in other amendments, as being implicit in the "liberty" assurance of the due process clause, and considers a right to one's personality as one of them. *Richards* is probably the best reasoned of all the school-law opinions, developing a broad, strong principle to protect the individual without altering traditional notions about freedoms under the Bill of Rights.[58] Pleading violation of the due process clause, however, may not be the strongest argument for the Reservist. The reluctance of the courts to review military discipline has been unparalleled, and overcoming this reluctance will require military interference with the most preferred freedoms.[59] Alleging violation of a substantive due process right is too often treated as merely an issue of procedural due process for which adequate notice to the Reservist will satisfy constitutional requirements.[60] In addition, all substantive due process violations are often viewed together, with a remedy or justification for the regulation violating the more clearly enunciated rights satisfying all due process requirements. For example, the Reservist usually will allege deprivation of property without due process of law because the hair restriction has impeded his civilian employment.[61] The court may be able to resolve this issue on a non-constitutional basis by suggesting that the Reservist can wear a wig for his civilian job,[62] and view any other substantive due process allegations as derived from this property right. Finally, overcoming the reluctance of the courts will also require the showing of military interference with a right that will allow the court to de-

57. Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970).

58. While *Richards* acknowledges that hair style or length may contain elements of expression or speech, the court specifically rejects the notion that communication through hair length is entitled to first amendment protection. *Id.* at 1283.

59. Only the military hair regulation cases were summary judgments for the defendant.

60. This unfortunate reality is created by the interaction of substantive and procedural due process. A violation of substantive due process always gives rise to a violation of procedural due process to the extent, at least, that there has not been an adequate hearing on the regulation. Remedying the procedural defect is then viewed as satisfying the substantive violation. Relating the effect of the procedural violation to the plaintiff Reservist, however, its remedy is translated as merely requiring adequate notice of the regulation and of the Reservist's violation of it.

61. The Reservist will usually plead deprivation of property without due process, even though it may weaken his other constitutional arguments, because it has traditionally been his strongest case for relief from the hair restrictions on an administrative level. *See supra* note 17 and accompanying text. Therefore, the Reservist will have made his civilian employment argument a part of his military record and feel compelled to include it in his pleadings.

62. *See* Gianatasio v. Whyte, 426 F.2d 908, 911 (2d Cir. 1970).

velop a narrow principle for protecting the individual.[63] Establishing personal appearance rights as implicit within the concept of liberty under the due process clause is "painting with a broad brush"; numerous military regulations might then be challenged as interfering with implicit liberties.

In *Breen,* wearing one's hair as one desired was considered a form of expression protected by the Constitution, possibly under the free speech clause of the first amendment.[64] This concept should be extended to recognize expression through hair style as clearly protected by the free speech clause of the first amendment as freedom of communication. Formulated in this manner, the Reservist could present his strongest argument, that military hair restrictions create a prima facie violation of his first amendment right to freedom of communication.[65] The first amendment protects the most preferred freedoms and the judicial recognition of the right to wear one's hair as one pleases, within the free speech clause, need not create a broad, sweeping principle. The courts, however, have traditionally protected only political communication under the free speech clause.[66] Coupling this policy with the judicial reluctance to review military discipline, a strong mandate against providing judicial protection of the Reservist is established. It is clear that the Reservist who merely expresses his personality or aesthetic values will not cause the courts to depart from this mandate. Therefore, the Reservist might plead and prove the actual and potential political aspects of the communication via the length of his hair; for example, that his hairstyle indicates association with a particular political group or philosophy, or that it indicates rejection of particular

63. *See generally* Raderman v. Kaine, 411 F.2d 1102, 1106 (2d Cir. 1969), evincing a strong reluctance by the court to become the arbiter of military regulations.

64. *Breen* cited Griswold v. Connecticut, 381 U.S. 479 (1965) and considered expression by hair style to be protected by a penumbra of rights under the first and ninth amendments if it was not protected by the free speech clause of the first amendment alone. Breen v. Kahl, 419 F.2d 1034, 1036) (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970). This constitutional approach, alleging that a right of personal appearance is protected by several amendments without specifying exactly which amendment creates the right, also appears to be a weak argument for the Reservist. The reluctance of the court to review military matters would probably prevail.

65. Recognizing the free speech clause to encompass "communication" and communication to encompass expression through hair length, appears a stronger formulation than considering expression through hair length a form of symbolic speech. The latter formulation requires considering hair merely a "symbol" of speech, a less compelling reason for the courts to overcome their reluctance to review military discipline.

66. It was probably for this reason that *Breen* took the route it did. *But see generally* Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First,* 60 NW. U.L. REV. 1 (1965). It should also be noted, however, that political expression within the military is not accorded the same protection as in civilian life. *See, e.g.,* Kester, *Soldiers Who Insult The President: An Uneasy Look at Article 88 Of The Uniform Code of Military Justice,* 81 HARV. L. REV. 1697 (1968).

political ideas or philosophies, or that it expresses a revolt against conventionality laden with specific political implications.[67] In addition, it might be advisable for the Reservist to restrict his pleadings to interference with substantive rights under the first amendment, eliminating a court conclusion that he was groping among the amendments hoping to find a violated right.[68]

Accordingly, it might also be advisable for the Reservist not to plead deprivation of constitutionally-required procedural rights under the fourth, fifth, sixth, and eighth amendments, unless he had not received any notice of the hair restrictions or his violations of them.[69]

Having established a prima facie interference with the Reservists', first amendment rights, any motion by the defendant for summary judgment should be denied. The issue is now whether the military via the defendant officer can present a sufficient public interest to warrant the hair restrictions.

D. *Absence of Military Justification*

In weighing the countervailing interest, one must take into account the nature of the right asserted, the context in which it is asserted, and the extent to which it has been infringed. When Alexander the Great ordered his troops to remove their beards, it was a military precaution "to remove the handle which the enemy can seize . . . ."[70] Similarly, when a Reservist's wearing of his hair at a certain length is viewed as a form of communication, only a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom."[71] The governmental interest must be either self-evident or affirmatively proven. In addition, the hair restriction must be inherently or affirmatively shown to relate to the governmental interest.

In both *Raderman* and *Gianatasio,* the court failed to require sufficient justification for the Army's application of its hair standards to Reservists. The court in *Raderman* reasoned that "the armed services, their officers and their manner of discipline serve an essential function in safe-

67. In *Gianatasio,* the defendant commanding officer apparently considered the Reservist's long hair as political expression. "This fortuitous connection with one of the world's great national holidays commemorating the overthrow of despotic power by non-conformists was of no moment . . . until, symbolically, appellants' commanding officers . . . concluded . . . that appellants long hair caused him to be guilty of 'unsatisfactory performance.'" Gianatasio v. Whyte, 426 F.2d 908, 909 (2d Cir. 1970).

68. The thought here is that the Reservist will not prevail under the other amendments. *See* Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969).

69. *See* discussion in *supra* note 60. *Cf.* Gianatasio v. Whyte, 426 F.2d 908, 911 (2d Cir. 1970): "Gianatasio has failed to show . . . [that he has] substantive rights to protect, we fail to see how any hypothetical deprivations of procedural rights can harm him."

70. P. BINDER, MUFF AND MORALS 87 (1965).

71. United States v. O'Brien, 391 U.S. 367, 376 (1968).

guarding the country."[72] Therefore, "[t]he need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty."[73] The court further reasoned that Raderman chose to join a Reserve unit; "[c]oncomitant with that decision was the knowledge that he would be subject to Army rules and regulations concerning his appearance for six years."[74] And what constitutes a neat and soldierly appearance, for the Reservist, within such regulations, certainly is within the discretion of the military.[75] In addition, the court found that the frequent need for expedition in call-up orders limited judicial review of military discretion.[76] The court also considered the radical change in appearance of the military throughout history, but determined that "past practices afford no criteria for the present."[77] The court concluded that there was "clearly no action by the military which [went] far beyond any rational exercise of discretion."[78] The court in *Gianatasio,* without requiring any military justification, simply declined to overrule *Raderman* on the substantive issues. In fact, the court concluded that the National Guard never even considered whether the Guardsman's hair affected his performance, "but only that his hair length did not conform to aesthetic requirements."[79]

While the armed forces do serve an essential function in safeguarding the country, no proof is offered to show that their manner of discipline serves this function. Instead, a sort of disciplinary domino theory is offered by the court in *Raderman;* since effectiveness of the Army depends on discipline, and discipline depends on hair restrictions, therefore hair restrictions make the Army effective in providing for national defense.[80] It is difficult to comprehend, however, how hair restrictions, as a means of Army discipline, relate at all to safeguarding the country.[81] "[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those lib-

72. Raderman v. Kaine, 411 F.2d 1102, 1104 (2d Cir. 1969).
73. *Id.*
74. *Id.* at 1106.
75. *Id.*
76. *Id.* at 1105.
77. *Id.* at 1106.
78. *Id.*
79. Gianatasio v. Whyte, 426 F.2d 908, 909 (2d Cir. 1970).
80. *See* Kester, *Soldiers Who Insult The President: An Uneasy Look At Article 88 Of The Uniform Code of Military Justice,* 81 HARV. L. REV. 1697, 1753 (1968).
81. Hair restrictions do not even seem to relate to the function of "military discipline," which requires the breeding of "respect for and loyalty to properly constituted authority." Army Reg. 600-20 (Jan. 31, 1967).

erties . . . which make the defense of the Nation worthwhile."[82] Therefore, in order to properly justify its restrictions the Army should at least have to prove that soldiers nonconforming in appearance only, perform less effectively than conforming soldiers. While the court in *Gianatasio* specifically concluded that no determination of this type was even considered, the only relevant information for the court in *Raderman,* was the past practices of the military. The court should have noted that great officers and great armies throughout history have fought valiantly and brilliantly protecting their countries and our country, while sporting prodigious coiffures, beards and mustaches.[83] Even today, mustaches are allowed within the Army and beards are allowed by the Naval Reserves.[84] The fact that the plaintiff chose to join the reserves does not alleviate the defendant's burden of proving a public purpose in the Army's hair restrictions. This is especially clear in view of the frequency of change in Army directives and regulations which determine the current Army hair standards.[85]

In addition, the court in *Raderman* failed to distinguish at all between the function of the regular Army and the function of the Army Reserves and their respective necessary disciplinary practices;[86] to consider their function the same is a denial of reality. While the court recognized that a reservist is "neither a civilian nor a full-time soldier," it treated the case

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82. United States v. Robel, 389 U.S. 258, 264 (1967), the Court weighing the justification for a statute restricting first amendment rights.

83. *See supra* text, section IV B.

84. Army Reg. 600-20 with C5 and C6 (Dec. 18, 1969); U.S. Navy Uniform Regulations, art. 1161 § a (1970).

85. While the Reservist has been held not to have a vested right in the statutes and regulations in force at the time he joined the military, (cases cited *supra* note 21), he has apparently been vested with any duties that may be created as the statutes and regulations change. This unique privilege that is given to the armed forces, to unilaterally alter both their rights and duties under a contract, places the Reservist in a rather precarious position. For example, Raderman cannot rely on the pre-July 1968 Directive allowing long hair if it is necessary for civilian employment, while the Army can rely on the July 1968 Directive not allowing long hair for any reason. *See supra* note 17 and accompanying text.

In addition, allowing extension of this privilege to deny to the Reservist either constitutional rights or rights specifically enunciated in the clauses of his Reserve contract should require careful scrutiny by the courts. At this point a valid, enforceable Reserve contract no longer exists; all mutuality of obligation has been removed. The court might even protect the Reservist from this situation with a simple remedy. A grandfather clause could be read into all of the statute and regulation changes, deeming that the intent of the rule-making body was to uphold the already existing contract. The procedural issues in *Gianatasio* involved such an extension. While further development of this situation is recommended, it is beyond the scope of this comment.

86. For example, in Reserve units new recruits often wear their civilian clothes until they go on active duty and are issued uniforms. This results in a non-conforming appearance among the men in the reserve unit regardless of hair style. There are always new recruits in a reserve unit.

as strictly a military matter.[87] However, it was the plaintiff's civilian status that was being injured.

Finally, in *Raderman* there was no need for an expeditious call-up requiring military discretion rather than judicial review. There was no national emergency, and a Reservist's fundamental rights were in issue. Certainly, the courts in *Raderman* and *Gianatasio* should not have granted the defendants' motions for summary judgment.

Assuming that through the structure of this comment the Reservist has established an interference with his first amendment freedom of communication, the Army has clearly failed to meet its burden of proving a "sufficiently important governmental interest"[88] to justify this interference. In order to effectuate this analysis, however, an appropriate legal remedy must be formulated to establish enforceable legal rights for the Reservist while maintaining the same basic judicial and legislative framework upon which the Reserves now function.

E. *Providing a Legal Remedy*

When restrictions upon a first amendment freedom have been established and no governmental interest is shown, the regulations invading that freedom are unconstitutional as violations of the first amendment. If a public purpose is shown but the regulations do not relate to it, the regulations must similarly be held unconstitutional in their application. The application of Army hair standards to the Reservist falls into either of the above categories; if there is a public purpose, it certainly has no relation to the regulations in their present form.

The judiciary might, therefore, take cognizance of its responsibility to civilians and provide affirmative relief for the Reservist whose freedom has been arbitrarily interfered with. The remedy may be simple and limited. First, the court might enjoin the lowest echelon officers from both prohibiting (or ordering the prohibiting of) Reservists from attending meetings, and from crediting (or ordering the crediting of) Reservists with unsatisfactory participation at a meeting, when the reason for these actions is based solely upon the Reservist's nonconformance with the Army's physical appearance standards (not including uniform requirements).[89] This

87. Raderman v. Kaine, 411 F.2d 1102, 1106 (2d Cir. 1969).

88. United States v. O'Brien, 391 U.S. 367, 376 (1968).

89. The injunction is aimed at the bottom of the chain-of-command for several reasons: first, it does not restrict military authority on any major level, or hamper military efficiency on any major level; second, it does not vest in the judiciary any military control on a major level; third, it affects the military level with the most control over the Reservist; fourth, it creates an effective stopgap should the upper levels of the chain-of-command decide to alter their regulatory scheme to avoid the injunction (that is, rule-making decisions take place at the top echelon of the military but their

relief is not discriminatory against soldiers in the regular Army because once activated, the Reservist is neither attending meetings nor under the protection of the injunction. That is, the Reservist can always receive a haircut when activated (other than ANACDUTRA),[90] thereby receiving equal treatment with the members of the regular Army when in equivalent status with them. In addition, the relief does not extend beyond those restrictions which necessarily interfere with the Reservist's freedom as a civilian.[91] It does, however, establish enforceable rights for the Reservist as a civilian without altering the military institution in any functional way.

Second, the court might set down a flexible standard for determining when military discipline will outweigh interference with a fundamental right. This standard would determine the future propriety of issuing an injunction similar to the one proposed above. The guideline should not be so strict that the Army is placed in the nearly impossible position of showing in every case that the Reservist's act posed an actual threat to military discipline, or so liberal that the Reservist is deprived of his fundamental rights without any proof of the relationship between his behavior and a legitimate governmental interest.[92] For example, a hair regulation applicable to the Reservist should be upheld and an injunction against military officers should not issue, if there is substantial evidence that actual or potential interference with something more than a purely ministerial military function will be the *proximate result* of a violation of personal appearance regulations. The evidence should be geographically and chronologically relevant.[93] The greater the interference or the more preferred the freedom, the stricter the standard should be.

Finally, it is suggested that the court need not declare void any statute, Army regulation or directive, and thereby destroy the complex statutory scheme within which the Reserves and regular Army function. The court need only provide some narrow remedy to protect those individuals whose rights have been infringed without justification.

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enforcement upon the troops takes place at the bottom echelon) and; fifth, it is doubtful that higher ranking officers would now try to enforce the restrictions.

90. For the purposes of this proposal, the Reservists' two week annual active duty training commitment (ANACDUTRA) is not meant to alter his reserve status or remove him from protection of the injunction. *See* Format A, *supra* note 10.

91. This is accomplished by having the court order focus on the Reservist's fundamental rights as a civilian and enjoining the regulations which conflict with those rights, rather than focusing on the specific restrictions which are unconstitutional.

92. *Cf.* Kester, *Soldiers Who Insult The President: An Uneasy Look at Article 88 Of The Uniform Code of Military Justice,* 81 HARV. L. REV. 1697, 1751 (1968).

93. Potential or actual interference may depend on the hair style preferences and prejudices of the other members of the military unit or military base and the members of the surrounding civilian community. Hair styles tend to differ throughout the country. In addition, the possibility of interference dissipates with time as the nonconforming hair style becomes in vogue.

V. An Alternative Solution: Conforming Wigs

One alternative remedy to the Reservists' plight, which initially appears to avoid all constitutional problems, is to allow the Reservist to wear a wig. Shall he wear a short-hair wig to his Reserve meetings, keeping his real hair long, or wear a long-hair wig as a civilian, keeping his real hair short for reserve meetings? For expedience, convenience, and comfort, the Reservist should choose the short-hair wig; the overwhelming majority of the time he is a civilian.[94]

A short-hair wig, conforming to Army Regulation standards of "short of medium length" and "neatly trimmed" should "appear soldierly," thereby satisfying all the requirements for Reserve meetings.[95] Around the beginning of 1970, Reservists were thus enlightened and by the end of the year the short-hair wig was very much in vogue at week-end meetings.[96] During this time, however, the Army's institutional complex had spent several months analyzing the situation, and reached their usual decision.[97] On June 24, 1970 an Army Directive was issued from the office of Major General Kaine, the defendant officer in *Raderman,* stating that Reservists were prohibited from wearing wigs during meetings unless necessitated by medical reasons as verified by a medical doctor.[98] Latest research reveals that Reservists are now seeking "radiclib" dermatologists for verification that medical reasons necessitate their wearing a wig at meetings.

The wearing of a short-hair wig to meetings was a simple, convenient remedy for the Reservist. It is unfortunate that the Army found it necessary to proscribe, rather than mandate its use. The suggestion may now be made, however, that another alternative remedy is to let the Reservist wear a long-hair wig for civilian life. Such a suggestion merely avoids the issues without offering a remedy. Unless the Army can justify its directive against wigs, the constitutional issues that have been developed throughout this comment are again raised with the remedy of injunction again suggested. The difference between the wearing of a short-hair wig for meetings and the wearing of a long-hair wig for civilian life, is that the latter is an infringement on the rights of a civilian.

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94. *See supra* text, section IV A.

95. *See supra* note 16 and accompanying text.

96. *See* LIFE, Mar. 20, 1970, at 34.

97. Viewing the changes in Army Reg. 600-20 (Jan. 31, 1967) to its present form as Army Reg. 600-20 with C5 and C6 (Dec. 18, 1969), it becomes apparent that the regulation will change to prohibit a manner of personal appearance that has been traditionally nonconforming as soon as it becomes popular.

98. 1st Army Cir. 600-12 (June 24, 1970), pending revision of Army Reg. 600-20 with C5 and C6 (Dec. 18, 1969).

VI. CONCLUSION

While Congress has almost unrestricted discretion in legislating for the Army, the Army in legislating for its own personnel should be subject to review.[99] This need for judicial review of the military becomes clearer as the personnel seeking protection take on a civilian character. The position is crystalized when the rights to be protected are fundamental freedoms. Army hair standards, derived from Army regulations and directives promulgated under Congressional statute, affect certain of these freedoms. Hair style, which necessarily includes hair length, is one of the earliest and most basic forms of communication known. As such, it is a freedom that must be protected by requiring justification of those regulations which interfere with it. Also, those regulations are being enforced against Reservists, who are civilians for all realistic purposes. The Army apparently has overlooked the necessity of proving a specific governmental interest in their hair standards, to justify their interference with the Reservists' freedom. "To fail to hold such arbitrary regulations unconstitutional because of fear of opening the floodgates to litigation . . . would be an abdication of the judiciary's role of final arbiter of the validity of all laws, and protector of the people . . . from the governmental exercise of unconstitutional power."[100] The intent, however, is not to place the military under judicial control, but to have the judiciary protect those civilians whose freedoms are under the control of the military. The Reservist is one of those people. For him there is no justification for expediency requiring military discretion rather than judicial review. There is also no need to interfere with his freedom in the name of military discipline. In fact, there is probably military value in allowing the Reservist to express himself through his hair style; he is happier and more cooperative, while the Army still maintains other military disciplines.

Perhaps, if the circuit courts of appeals continue to divide on the constitutionality of hair regulations in schools, the United States Supreme Court will grant certiorari and determine whether school boards may impose their taste or preference as a standard. It might even be decided, that the freedom to wear one's hair at a desired length is a freedom under the free speech clause of the first amendment. Regardless, the judiciary must not abdicate its role where the military is concerned. As stated in *Winters v. United States*[101] by Mr. Justice Douglas, "[t]here are those who in tumultuous times turn their faces the other way saying that it is not the function of the courts to tell the armed forces how to run a war. Of

99. *But see* Kester, *Soldiers Who Insult The President: An Uneasy Look At Article 88 Of The Uniform Code Of Military Justice*, 81 HARV. L. REV. 1697, 1754 (1968).

100. Breen v. Kahl, 419 F.2d 1034, 1038 (7th Cir. 1969).

101. 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice, 1968).

course that is true. But it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our armed forces are treated as honored members of society whose rights do not turn on the charity of a military commander." And in the case of the Reservist, it is the function of the courts to make sure that a civilian's rights do not turn on the charity of a military commander.

BRUCE V. WEITZEN

THE EFFECT OF THE NEW YORK CRIMINAL PROCEDURE LAW UPON THE TREATMENT OF THE MENTALLY INCOMPETENT DEFENDANT

The mental condition of the defendant assumes importance in a criminal proceeding under two distinct legal concepts. The first involves a determination of the responsibility of the individual for the alleged criminal act and thus revolves around his mental condition at the time of its commission. This gives rise to the so-called insanity defense.[1] The second concept concerns the individual's competency to proceed at trial. In this context, attention is focused upon the mental state of the individual prior to and during the judicial proceeding.[2] The purpose of this comment is to critically examine the present New York law with respect to this latter concept. Particular attention will be paid to defects in New York law and the possible curative effect of the recently enacted Criminal Procedure Law.[3]

1. There are three principal tests whereby a defendant may be acquitted by reason of insanity. The most frequently applied is the so called M'Naghten rule. Briefly stated the defendant is not guilty by reason of insanity if at the time of the act he did not know the nature or quality of the act, or if he did, he did not know that it was wrong. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). The test applied in the District of Columbia and New Hampshire is the so called Durham rule, under which an accused is not criminally responsible if his unlawful act was the product of mental disease or defect. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The third test is that proposed by the Model Penal Code. Under this test

> [a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).

2. There is a great deal of literature in this area. *See* T. SZASZ, PSYCHIATRIC JUSTICE (1965); Bennets, *Competency to Stand Trial: A Call for Reform*, 59 J. CRIM. L.C. & P.S. 569 (1968); Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 379 (1969) [hereinafter cited as Eizenstat]; Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results and Problems*, 119 AM. J. PSYCHIATRY 713 (1963) [hereinafter cited as Hess & Thomas]; Silving, *The Criminal Law of Mental Incapacity*, 53 J. CRIM. L.C. & P.S. 129 (1969); Slough & Wilson, *Mental Capacity to Stand Trial*, 21 U. PITT. L. REV. 593 (1960); Comment, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967).

3. [1970] N.Y. SESS. LAWS ch. 996. The Criminal Procedure Law [hereinafter cited as CPL] is to become effective Sept. 1, 1971. [1970] N.Y. SESS. LAWS ch. 996, § 5.